82-1171



No. ..-..

IN THE

# Supreme Court of the United States

October Term, 1982

GARRISON M. EVERETT,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.**

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## Questions Presented.

1. Whether legal impossibility is a defense to the crime of conspiracy.

2. Whether legal impossibility is a defense to the crime of conspiracy to impair, impede, and obstruct the Department of the Treasury in the "collection of tax revenue" where the government designed and participated in a "sting" operation utilizing a *fictitious* taxpayer who under no circumstance could ever be obligated to file a tax return and/or pay taxes.

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GARRISON M. EVERETT,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

GARRISON M. EVERETT, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 15, 1982. (There are no parties to this proceeding other than the party named in the caption.)

### Opinion Below.

The opinion of the Court of Appeals (App., *infra*, 1-9) is reported at 692 F.2d 596.

### Jurisdiction.

The opinion of the court below affirming petitioner's conviction (Appendix, *infra*), was entered on November 15, 1982. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

**Statute Involved.**

18 U.S.C. §371 provides, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

**Statement.**

Petitioner was indicted with others in the Central District of California on a one-count indictment alleging violation of 18 U.S.C. §371, conspiracy to impair, impede and obstruct the Department of the Treasury in the collection of tax revenue.

After a trial by jury, petitioner was convicted and was sentenced to three years to the custody of the Attorney General and to serve six months in a jail-type institution. The balance of the sentence was suspended and petitioner was placed on five years probation and ordered to pay a fine of $5,000. Petitioner appealed and his conviction was affirmed.

The government's evidence at trial consisted primarily of the testimony of an undercover IRS Agent who posed as the representative of a *non-existent* wealthy resident alien who wanted to shelter 1980 and 1981 income. In March, 1981 after an initial meeting and several discussions, the Agent asked petitioner about sheltering between $150,000 and $180,000 that his *fictitious* client had received in taxable income for 1980. Petitioner told the Agent that he could create a tax shelter for 1980 by backdating the necessary documentation.

After further discussions, a backdating scheme was devised and documents were signed in the Agent's presence on April 16, 1981 and dated December 22, 1980. After the documents were signed, the Agent gave Petitioner $45,000 as a down payment and lease payment in connection with the plan. Shortly after the money exchanged hands, petitioner was arrested.

## REASONS FOR GRANTING THE WRIT.

### A. Legal Impossibility as a Defense to Conspiracy.

This case presents a dangercus "logical" extension of the conspiracy doctrine. The warning sounded by Justice Jackson, in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440 (1949), has come to pass. Greatly troubled by the then expanding use of the conspiracy doctrine, Justice Jackson acknowledged that the history of conspiracy exemplifies the tendency of a principle to expand itself to the limit of its logic. He warned,

> ". . . the looseness and pliability of the doctrine [referring to conspiracy] present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case". At 336 U.S. 445-449.

Assume on May 10, 1982, A and B entered into an agreement to kill Mr. Smith. Unknown to A and B, Mr. Smith died of a heart attack on May 9, 1982. What result?

Given the amorphous nature of the crime of conspiracy and its dragnet impact, the criminal goal or object of the conspiracy must be obtainable in order to sustain a conviction. The Fourth Circuit so holds—*Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957) (there can be no conspiracy to commit a crime when it is legally impossible to commit the underlying substantive offense). The Ninth Circuit Court of Appeals in the instant matter, the Second Circuit Court of Appeals in *United States v. Giordano*, 693 F.2d 245 (2d Cir. 1982), the First Circuit in *United States v. Waldron*, 590 F.2d 33 (1st Cir. 1979) and the Seventh Circuit in *United States v. Rose*, 590 F.2d 232 (7th Cir. 1978) have ruled to the contrary. There presently exists a conflict in the circuits concerning this important public policy question. The same public policy considerations which

support the legal impossibility defense in the case of "attempt" equally apply to the crime of conspiracy. If anything, since less is required to convict in the case of conspiracy, the protection should be broader, not less. To say that the crime of conspiracy is a separate offense is self-serving, but does not answer the threshold question. If the substantive crime, from the outset, could not under any set of circumstances take place, the law should not convert that conduct, under the guise of a conspiracy, into a crime.

**B. Standards for Establishing Legal Impossibility.**

Assuming arguendo the defense of legal impossibility is available as a defense to the crime of conspiracy, what must the government prove? Here again the circuits are in serious conflict. The Second Circuit test looks at the circumstances as the defendant believes them to be. *United States v. Marin*, 513 F.2d 974 (2d Cir. 1974). The Third and Fourth Circuits focus solely on the question whether the objective acts committed by the defendant constitute a crime irrespective of the defendant's intent. *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973); *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957). The Fifth Circuit (*United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976)) and the Ninth Circuit Court of Appeals in the instant case apply yet another standard—the acts of the defendant must strongly and unequivocally corroborate his intent to commit the crime in question.

Finally, there is yet another conflict in the circuits. Petitioner asserts there can be no conviction for conspiracy to defraud the government when the government has participated in and has knowledge of the scheme. In *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973), the defendants were convicted of an attempted violation of 18 U.S.C. §1791 for smuggling letters into a federal prison without knowledge and consent of the warden. The warden in fact

knew of the letters. The Third Circuit reversed the convictions on the grounds that, since the substantive offense was not in fact committed, the defendants could not be convicted of an attempt to commit the offense. The Ninth Circuit rejected *Berrigan* in the instant case.

The sound administration of justice requires uniformity among the circuits so that citizens of the United States are treated equally. This court should address the conflict and resolve the issue.

**Conclusion.**

The public policy question concerning the availability of the defense of legal impossibility to the crime of conspiracy is an issue with far-reaching overtones. We are developing a system which encourages theoretical and hypothetical crimes as a substitute for the painstaking process of evolving a factual basis for conviction. Evil thought—no matter how reprehensible—should not be the subject of a prosecution. Moreover, the conflicts by and among the circuit courts of appeal should be resolved in the interest of judicial administration. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: January 12, 1983.

Respectfully submitted,

BRUCE I. HOCHMAN,

*Counsel for the Petitioner.*

STEPHEN V. WILSON,

MARTIN N. GELFAND,

*Of Counsel.*

## APPENDIX.

### Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff/Appellee, vs. Garrison M. Everett and Richard I. Chira, Defendants/Appellants. Nos. 81-1532, 81-1589.

DC No. CR 81-489(A)DVK.

Filed: November 15, 1982.

On Appeal from the United States District Court for the Central District of California. Honorable David Kenyon, District Judge, Presiding.

Argued and Submitted: October 4, 1982.

Before: ANDERSON, PREGERSON, and NELSON, Circuit Judges.

PREGERSON, Circuit Judge:

Appellants Everett and Chira appeal their convictions for conspiracy to impair, impede, and obstruct the Department of the Treasury in the collection of tax revenue in violation of 18 U.S.C. § 371.[1] A jury found appellants guilty of conspiring to sell tax shelter investments that had been backdated to allow the buyers to claim deductions on their federal income tax returns for years prior to those in which the transactions actually took place.

The government's evidence at trial consisted primarily of the testimony of an undercover IRS agent who answered an advertisement in a newspaper offering tax shelter in-

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[1] 18 U.S.C. § 371 provides, in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

vestments and was referred to appellant Everett's firm, Intervest Associates, Inc. The agent posed as the representative of a wealthy resident alien who wanted to shelter 1980 and 1981 income. The agent met with Everett, appellant Chira and two others from Intervest to discuss general tax strategies. After this initial meeting, the agent met or spoke with Everett eight times and with Chira three times to plan a tax strategy to shelter income for both 1980 and 1981.

In March 1981, the agent asked Everett about sheltering between $150,000 and $180,000 that his fictitious client had received in taxable income for 1980. Everett told the agent that he could create a tax shelter for 1980, even at such a late date, by backdating the necessary documentation.

After further discussions, Everett and the agent agreed on a plan to generate an $83,000 1980 tax write-off for the agent's client by combining a sale/lease-back of a Rolls Royce owned by appellant Chira and a computer sale/lease-back transaction.

On April 16, 1981, the agent met both Chira and Everett at the Intervest offices to complete the computer and Rolls Royce transactions. Appellant Chira signed a conditional sales contract for the Rolls which was backdated to December 22, 1980. The agent received a number of documents relating to both transactions signed by Everett, Chira, and Roberta Mackey[2] backdated to December 22, 1980. All documents signed by Everett and Chira were signed in the agent's presence on April 16, 1981 and dated December 22,

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[2]Roberta Mackey was an Intervest employee who acted as a "trustee" for Intervest's clients in tax shelter transactions. Here, Ms. Mackey purchased the computer equipment and the Rolls Royce in trust for the fictitious taxpayer and signed a Trust and Fiduciary Agreement which was used to create the false impression that both the computer and the automobile tax shelters were complete in 1980.

Ms. Mackey testified at the trial in return for immunity.

1980. After the signing of the documents, the agent gave appellants $45,000 as down payment and lease payments on the automobile and the computer. Finally, the agent, Chira and Everett went to the parking garage to inspect the Rolls Royce, at which time Chira and Everett were arrested.

A grand jury indictment was returned charging Chira, Everett, and Intervest Associates, Inc. with conspiracy to defraud the United States by impairing, impeding, and obstructing the IRS in the collection of tax revenue.

*Legal Impossibility*

Both appellants assert that their convictions should be reversed on the grounds of legal impossibility. Appellants argue that it was legally impossible for them to impede the collection of taxes because there was no real taxpayer nor any actual tax due, and because the government had knowledge of the scheme.

Two responses defeat appellants' assertions. First, the charge of conspiracy to impede the collection of taxes does not require the filing of a tax return by a real taxpayer. Second, the doctrine of legal impossibility is not available as a defense to a charge of conspiracy in this circuit.

A conspiracy to defraud the United States under 18 U.S.C. § 371 need not involve an agreement to defraud the government out of money or property, but only requires an agreement to impede the government's lawful functions. Section 371 does not require that the government actually be harmed; it reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government." *Dennis v. United States*, 384 U.S. 855, 861 (1966) quoting *Haas v. Henkel*, 216 U.S. 462, 479 (1910). In the instant case, the purpose of the conspiracy was to impede the lawful function of the

IRS, that is, the collection of taxes, and the existence of a real taxpayer is therefore immaterial.

Furthermore, this court has rejected the doctrine of legal impossibility as a defense to a charge of conspiracy. Appellants compare their case to *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957), in which the Fourth Circuit held that there can be no conspiracy to commit a crime when it is legally impossible to commit the underlying substantive offense. Appellants argue that there is Ninth Circuit support for the legal impossibility doctrine of *Ventimiglia* in *Lubin v. United States*, 313 F.2d 419 (9th Cir. 1963).

Appellants' reliance on *Lubin* is misplaced. *Lubin* did not in fact involve a defense of legal impossibility. In that case, the crucial issue was whether the alleged action constituted a federal offense. The defendants had been convicted of a conspiracy to steal property belonging to banks. That conviction was reversed because the money in the armored truck that the defendants conspired to rob did not in fact belong to a bank. The court found that, although the robbery scheme was a taking punishable by state law, the crime was not within the federal statute:

> This would be an offense under the laws of California . . . . It would be a federal offense only if the objective was to take "property or money * * * belonging to" a federally protected bank . . ., and the crucial question is whether the evidence shows such a conspiracy.

*Lubin*, 313 F.2d at 420.

In fact, this court does not follow the Fourth Circuit's decision in *Ventimiglia*. In *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976), we rejected legal impossibility as a defense to a charge of conspiracy to transport in interstate commerce animals killed in violation of federal law. The appellees were charged with substantive violations of federal hunting laws and with conspiracy. They had acted

as guides for a hunting expedition during which game was killed by undercover federal agents. The district court dismissed the substantive and conspiracy counts because the killing of the animals had been "authorized" by the federal government and was not therefore in violation of the law. On appeal, we rejected the legal impossibility defense:

> The district court dismissed this [conspiracy] count on the ground that appellees cannot be charged with conspiracy to commit a substantive crime when the scheme, if completed, does not constitute an offense against the United States. We disagree. Apart from the ultimate disposition of the substantive counts of the indictment charging interstate transportation of illegally killed animals, "the crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts . . ., and is not at all dependent upon the ultimate success or failure of the planned scheme." (Citations omitted.)

547 F.2d at 1091. *See United States v. Thompson*, 493 F.2d 305 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974).

In *United States v. Brooklier*, 459 F. Supp. 476 (C.D. Cal. 1978) (Pregerson, D.J.), the court closely examined the precedent on legal impossibility as a defense to a charge of attempt. The court stated that "it is well-settled in this Circuit that impossibility is not a defense to a charge of *conspiracy* to commit an offense." 459 F. Supp. at 481 (emphasis in original). Exploring then the issue of impossibility as a defense to an attempt, the court concluded that Fifth Circuit precedent regarding legal impossibility should be followed:

> The Fifth Circuit's standard, which requires objective acts to unequivocally corroborate the necessary criminal intent, properly accommodates the concerns underlying the conflicting views on the impossibility defense. Such an accommodation safeguards both the

> government's interest in deterring criminal conduct and the citizen's right not to be injured by "possible erroneous official conclusions about his guilty mind." (Citations omitted.)

459 F. Supp. at 482.

The conclusion of *Brooklier* was later adopted by this court in *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2040 (1982). We therefore require significant objective acts to corroborate unequivocally the criminal intent in a conspiracy, but disregard the legal possibility or impossibility of achieving a criminal result. *Bagnariol* involved convictions for violations of federal law against corruption, extortion, and gambling. One appellant argued that the requisite impact on interstate commerce was lacking because the entity he attempted to extort was a fictitious organization created by undercover FBI agents. We stated that "[t]he analysis in *Brooklier* disposes of [appellant's] impossibility defense." 665 F.2d at 896.

Finally, in *United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223 (9th Cir. 1981), we referred to the legal impossibility defense as "nonsense." Appellants were convicted of offering to pay kickbacks for the referral of medical services reimbursable from Medicare and Medi-Cal funds. Appellants argued that the violations were impossible of commission because the facilities and the owners of the facilities to whom appellant allegedly offered kickbacks were fictitious entities created by undercover FBI agents. We flatly rejected the defense:

> Duz-Mor contends that the government failed to prove a "jurisdictional prerequisite" to [the] violations because the rebate offer was made to an F.B.I. informant who could not in fact refer . . . Medicare and Medi-Cal services [that were] reimbursable from federal funds. This argument is nonsense.

650 F.2d at 227, n.5.

Both appellants assert a second legal impossibility defense on the grounds that there can be no conviction for conspiracy to defraud the government when the government has knowledge of the scheme. Appellants rely on *United States v. Berrigan*, 482 F.2d 171 (3rd Cir. 1973), in which the defendants were convicted of an attempted violation of 18 U.S.C. § 1791 for smuggling letters into a federal prison without the knowledge and consent of the warden. The warden in fact knew of the letters. The Third Circuit reversed the convictions on the grounds that, since the substantive offense was not in fact committed, the defendants could not be convicted of an attempt to commit the offense.

However, *Berrigan* is considered a minority view on the issue of legal impossibility and "most courts and commentators have not adopted the *Berrigan* approach." *Brooklier*, 459 F. Supp. at 480. Clearly, this court has rejected *Berrigan*. *See Bagnariol* and *Sanford, supra.*

*Government Misconduct*

Appellant Chira contends that the district court erred in denying his motion to dismiss the indictment on the grounds of government misconduct. Chira claims several inaccuracies in the presentation of his case, including misinformation in the affidavit of probable cause submitted in support of the complaint, misidentification of him as "Joseph" rather than Richard Chira on both the arrest warrant and complaint, and excessive and unnecessary use of hearsay testimony before the grand jury.

None of these alleged inaccuracies approaches the level of government misconduct necessary to violate the due process clause or to justify an exercise of the supervisory power of the court. Under its inherent supervisory powers, a federal court is empowered to dismiss an indictment on the basis

of governmental or prosecutorial misconduct. *United States v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978). However, such supervisory power will be used to dismiss an indictment only when the misconduct represents "a serious threat to the integrity of the judicial process." *United States v. Samango*, 607 F.2d 877, 885 (9th Cir. 1979). The violations alleged by appellant Chira do not rise to this level. Therefore, the district court did not err in rejecting his motion to dismiss.

*Hearsay Testimony*

Appellant Chira contends that the district court erred in admitting the testimony of Roberta Mackey regarding an alleged telephone conversation between Intervest employee Ronald Nachtwey and Chira. Ms. Mackey testified that she overheard a conversation between Nachtwey and Chira tending to show that Chira had knowledge of and prepared the backdated Trust Agreement admitted as Exhibit 8 at trial.

The district court admitted this hearsay testimony under the coconspirator admission exception, Fed. R. Evid. 801(d)(2)(E),[3] on the grounds that Nachtwey was acting as an agent of the indicted coconspirator, Intervest Associates, Inc. This evidentiary ruling was not reversible error. Nachtwey was a target of investigation in the case and was sufficiently connected to the conspiracy to qualify as an unindicted coconspirator for the purpose of Rule 801(d)(2)(E). In addition, even if the hearsay was erroneously admitted, the error was harmless because there was additional direct

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[3]Federal Rule of Evidence 801(d)(2)(E) provides:

(d) A statement is not hearsay if—

. . .

(2) The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

testimony from Ms. Mackey showing appellant Chira's knowledge of and preparation of the subject Trust Agreement.

*Sufficiency of the Evidence*

Appellant Chira contends that the evidence presented at trial was insufficient to support his conviction for conspiracy. However, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt the essential elements of the conspiracy. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The elements of the conspiracy offense are an agreement to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose and the requisite intent necessary to commit the underlying offense. *United States v. Oropeza*, 564 F.2d 316, 321 (9th Cir. 1977). In the instant case the underlying offense was defrauding the United States. Although there was ample evidence of his participation in the backdated tax shelter transaction, appellant Chira argues that the evidence of his intent was insufficient. However, it is well-settled that such intent may be inferred. *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980). In the instant case, the jury could have inferred from the evidence presented that Chira intended to agree with Everett and others to impede the collection of taxes.

In sum, the district court did not err in rejecting the defense of legal impossibility, because legal impossibility is not a defense to a charge of conspiracy. The district court did not err in rejecting appellant Chira's motion to dismiss nor in admitting Ms. Mackey's hearsay testimony against Chira. The evidence presented at trial was sufficient to sustain Chira's conviction for conspiracy.

Therefore, the judgment of the district court is AFFIRMED.

No. 82-1171

# In the Supreme Court of the United States

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GARRISON M. EVERETT, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether petitioner's claim of "legal impossibility" constitutes a defense to a charge of conspiracy to obstruct the Internal Revenue Service in the collection of tax revenue, based on petitioner's role in devising a tax shelter scheme involving use of backdated documents for a fictitious taxpayer.

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*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 692 F.2d 596.

### JURISDICTION

The judgment of the court of appeals was entered on November 15, 1982. The petition for a writ of certiorari was filed on January 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTE INVOLVED

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

## STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner and a co-defendant, Richard I. Chira,[1] were convicted of conspiring to defraud the United States by impeding, impairing and obstructing the Internal Revenue Service in the collection of tax revenue, in violation of 18 U.S.C. 371. Petitioner was sentenced to three years in the custody of the Attorney General, with all but six months of the sentence suspended, placed on five years' probation, and fined $5,000. The court of appeals affirmed petitioner's conviction (Pet. App. 1-9).

The evidence showed (Pet. App. 1-3) that in March and April 1981 petitioner devised a scheme to shelter a substantial amount of the 1980 taxable income of a resident alien taxpayer by backdating documents to 1980. The shelter scheme combined a sale/lease-back of a Rolls Royce owned by Chira, petitioner's co-defendant, and a computer sale/lease-back transaction. The taxpayer was fictitious, an invention of an undercover IRS agent who had been referred to petitioner's firm after answering a newspaper advertisement offering tax shelter investments. The agent posed as a representative of the taxpayer and negotiated the shelter arrangement with petitioner and Chira. On April 16, 1981, in the agent's presence, petitioner and Chira signed the documents, which were backdated to December 22, 1980. At that time petitioner accepted $21,540 from the agent in connection with the transaction. Shortly thereafter, petitioner was arrested.

## ARGUMENT

1. Petitioner contends (Pet. 4-5) that it was legally impossible for him to commit a substantive crime because the taxpayer involved in the shelter scheme he devised was

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[1]Chira also has filed a petition for a writ of certiorari. *Richard I. Chira* v. *United States*, No. 82-6040 (filed Jan. 14, 1983).

fictitious and could not file tax returns or pay taxes and that such legal impossibility constitutes a defense to the charge of conspiracy.

Petitioner's contention is without merit. Assuming, arguendo, that petitioner had demonstrated legal impossibility,[2] that would not constitute a defense to a charge of conspiracy, even in cases in which an agreement to commit a substantive offense is charged. Conspiracy presents a special danger to society, separate from that posed by the substantive offense that is the goal of the conspiracy. See, *e.g.*, *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Conspiracy is an offense that is separate and distinct from the underlying substantive crime; it is complete upon the agreement to commit the substantive crime and commission of an overt act in pursuit of it. See *United States* v. *Feola, supra*, 420 U.S. at 694; *United States* v. *Bayer*, 331 U.S. 532, 542 (1947). It is irrelevant that conspirators may be unable to achieve their criminal purpose, so long as they agree to commit the substantive crime. See *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915) ("[a] person may be guilty of conspiring although incapable of committing the objective offense"). These principles have led a number of courts of appeals to conclude correctly that impossibility does not constitute a defense to a charge of conspiracy. See, *e.g.*, *United States* v. *Waldron*, 590 F.2d 33, 34 (1st Cir.), cert. denied, 441 U.S. 934 (1979); *United States* v. *Giordano*, 693 F.2d 245, 249 (2d Cir. 1982); *United States* v. *Jannotti*, 673 F.2d 578, 591 (3d Cir.) (en banc), cert. denied, No. 81-1899 (June 7, 1982); *United States* v. *Rose*, 590 F.2d 232, 235-236 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979); *Beddow* v. *United States*, 70 F.2d 674, 676 (8th Cir.

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[2]In fact, it is unclear whether the alleged impossibility is more properly characterized as "legal" or "factual." See page 5 note 4, *infra*.

1934); *United States* v. *Thompson*, 493 F.2d 305, 310 (9th Cir.), cert. denied, 419 U.S. 834 (1974).[3] Cf. *Ventimiglia* v. *United States*, 242 F.2d 620 (4th Cir. 1957).

Petitioner's contention is particularly weak in the present case, in which he is charged not with conspiracy to commit a particular substantive crime, but with conspiracy to defraud the United States, a much broader objective. In such a case it is necessary only to prove an agreement to impair the lawful functions of the government and an overt act in pursuit of it. See *Dennis* v. *United States*, 384 U.S. 855, 861 (1966). It is clear that petitioner agreed to act in a manner that would impair the functions of the IRS and took steps toward that end. The existence of a real taxpayer who actually would file a tax return and/or pay taxes, thereby committing a substantive crime, is unnecessary to the conclusion that petitioner conspired to defraud the United States. See Pet. App. 4-5.

Petitioner argues (Pet. 4-5) that there is a conflict between the Fourth Circuit's decision in *Ventimiglia* v. *United States, supra*, and the decisions of the First, Second, Seventh and Ninth Circuits cited above on the question whether legal impossibility constitutes a defense to a charge of conspiracy. It is questionable whether the conflict that petitioner describes in fact exists. The holding in *Ventimiglia* did not concern impossibility, but rather whether there was sufficient evidence to support a finding of a conspiracy to violate a provision of the Taft-Hartley Act that prohibited payment of money by an employer to any representative of its employees. The defendants had agreed to make payments to an individual who was not, and who they

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[3]See also W. LaFave & A. Scott, *Criminal Law* § 62, at 474-476 (1972) (courts in conspiracy cases usually have held that impossibility of any kind is not a defense); Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 944-945 (1959).

knew was not, an employee representative. The court concluded, therefore, that the government had failed to prove its charge of a conspiracy to violate the Act. 242 F.2d at 622-625. The court went on to state that if the defendants had believed that payments would be made to an employee representative, legal impossibility could be a defense to a charge of conspiracy. *Id.* at 625-626. However, the statements concerning impossibility constitute dictum, not a holding. Moreover, it is unclear whether *Ventimiglia*, which was decided in 1957, and which is rarely cited by federal courts for its discussion of impossibility, remains good law today.[4] Cf. *Osborn* v. *United States*, 385 U.S. 323, 333 (1966).

2. Petitioner further contends (Pet. 5-6) that this Court should resolve a conflict among the circuits relating to "standards for establishing legal impossibility." As suggested in the preceding section, impossibility is not a defense to a charge of conspiracy, so there is no need to reach the question of a proper definition of impossibility. Moreover, the cases petitioner cites for the proposition that

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[4]Even if *Ventimiglia* could be read to conflict with the decisions of other courts of appeals, that conflict does not affect this case. *Ventimiglia* and the decisions of other circuits cited by petitioner address impossibility as a defense to charges of conspiracy to commit specific substantive crimes. The present case involves a conspiracy to defraud the United States, a much broader objective that does not necessarily entail the commission of a particular substantive crime. See page 4, *supra*. Moreover, the present case may well involve factual impossibility, as opposed to legal impossibility. The court in *Ventimiglia* acknowledged that factual impossibility would not be a defense to a charge of conspiracy and that the line between the two varieties of impossibility is not always easy to draw. 242 F.2d at 625-626. See also *United States* v. *Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D. N.Y.), aff'd, 484 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 978 (1974) ("factual impossibility" denotes conduct where the objective is proscribed by the criminal law, but a circumstance unknown to the actor prevents him from bringing it about).

a conflict exists have little relevance to the present case. Three of the cases cited—*United States* v. *Marin*, 513 F.2d 974 (2d Cir. 1974); *United States* v. *Berrigan*, 482 F.2d 171 (3d Cir. 1973); and *United States* v. *Oviedo*, 525 F.2d 881 (5th Cir. 1976)—involve attempt charges. Thus, they cannot be regarded as precedents for conspiracy cases. See, *e.g.*, *United States* v. *Giordano*, *supra*, and *United States* v. *Jannotti*, *supra*. As noted in the preceding section, the Fourth Circuit's discussion of impossibility in *Ventimiglia* is dictum, since the defendants in that case in fact were aware of the objective circumstances. In addition, the views of the Fifth Circuit in *Oviedo* and the Ninth Circuit in the decision below that there should be "significant objective acts to corroborate unequivocally the criminal intent in a conspiracy" (Pet. App. 6) do not represent a standard for defining impossibility, but were set forth as a safeguard against "possible erroneous official conclusions" about a defendant's state of mind (*ibid.*, quoting *United States* v. *Brooklier*, 459 F. Supp. 476 (C.D. Cal. 1978)).

Petitioner argues finally (Pet. 5) that *United States* v. *Berrigan*, *supra*, stands for the proposition that "there can be no conviction for conspiracy to defraud the government when the government has participated in and has knowledge of the scheme." *Berrigan* does not stand for that proposition. In *Berrigan* the charge was an attempt to commit the substantive crime defined under 18 U.S.C. 1791 as smuggling letters into a federal prison without the knowledge and consent of the warden. In fact, the warden did have knowledge of the letters at issue, and the court concluded that the government therefore had failed to prove a statutory element of the completed crime. *United States* v. *Berrigan*, *supra*, 482 F.2d at 185-190. That holding is irrelevant to the present case, in which ignorance of government officials is not an element of the offense. *Berrigan* has,

moreover, been limited by the Third Circuit to the particular statute at issue in that case. *United States* v. *Everett*, No. 81-2644 (Feb. 15, 1983).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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